STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 18,482
	)	& 18,840
Appeal of	)	

INTRODUCTION

In these consolidated appeals, both sets of petitioners appeal decisions of the Department for Children and Families, Economic Services Division, (DCF) to count adoption subsidies paid to them by the Department of Social and Rehabilitation Services as income in determining eligibility for the Food Stamp program.

FINDINGS OF FACT

The parties have stipulated to the first two sets of facts; underlined portions were taken from documents submitted by the parties. The facts in part three are common to both petitioners and are based upon documents submitted by the parties.

PETITIONERS L. (#18,482)

1. Petitioners L. adopted S. on December 31, 1998 when she was nine-years-old.

2. S. has lived with Petitioners L. as a foster child since August, 1997.

3. At the time of S.'s adoption, the L.'s were receiving a foster care maintenance payment of $1,065.00 per month.

4. Pursuant to the Department of Social and Rehabilitative Services Adoption Assistance Agreement and the Subsidized Adoption Program Determination of Special Needs, the L.'s continue to receive $1,065.00 per month in the form of an adoption subsidy (hereafter "subsidy"), following their adoption of S.

5. S. has been determined by SRS to be a special needs child because she suffered early childhood gross neglect and sexual abuse, has a history of aggressive behaviors, is on an IEP at school as an emotionally disturbed child, has attachment difficulties, excessive tantrums and rages, sleep disturbance, poor wetting control, a bowel condition and ADHD. She is described by SRS as having overwhelming physical and emotional needs and in need of a subsidy to facilitate permanency in her placement. S. is on Medicaid but is not eligible for SSI benefits.

6. Petitioners L. reported the adoption to the Department of PATH[1] (hereafter "PATH"). PATH did not count

[1] PATH has been reorganized and renamed as the Department for Children and Families, Economic Services, (DCF).

the subsidy as income for the determination of the L.s' Food Stamp eligibility from January 1, 1999 through April 30, 2003.

7. In April 2003, PATH determined that the subsidy should have been counted as income pursuant to W.A.M. § 273.9(b), and that the subsidy is not subject to exclusion pursuant to W.A.M. § 273.9(c), and that the subsidy is not subject to any deductions pursuant to W.A.M. § 273.9(d). On or about May 15, 2003, as a result of making this determination, PATH issued a notice to the Petitioners of a Food Stamp overpayment in the amount of $4,104.00 for May 1, 2002 through May 31, 2003.

8. On or about May 15, 2003, PATH issued a notice stating that while the Ls continue to be eligible for Food Stamp benefits, their income exceeded the highest level at which benefits could be paid, and that their benefits would therefore be decreased to zero.

9. On or about May 29, 2003, the Petitioner Ls appealed PATH's decision to seek a recoupment of the overpayment claimed by PATH, and the Petitioners appealed PATH's decision to reduce the Petitioners' Food Stamp benefits.

10. As a result of the Petitioners' appeal. Recoupment of the claimed overpayment has been stayed pending a decision in this matter, and the Petitioners have been and will be receiving continuing Food Stamp benefits pending a decision in this matter.

PETITIONER P. (#18,840)

11. Petitioner P. is the adoptive mother of K.

12. Prior to the adoption, K. was in SRS custody and had been placed as a foster child in the home of Petitioner P.

13. K. is a child with serious special needs and is considered by the state to have a mental or emotional handicap. Specifically, she has suffered from sexual, physical and emotional abuse; she is diagnosed as having PTSD and major depressive disorder, NOS; and she suffers from nightmares several times a week. K. was determined to require a special needs subsidy in order to achieve a permanent placement. K receives Medicaid but is not eligible for SSI.

14. Because of K.'s special needs, Petitioner P. receives a federal adoption subsidy in the amount of $1,200 per month.

15. The adoption subsidy is paid to the adoptive family to compensate the adoptive family for the costs associated with the special needs of the adoptive child.

16. Petitioner P. estimates that she incurs $931 in monthly expenses directly related to addressing K.'s special needs.

17. The Department of Children and Families counted all of the adoption subsidy as income to the family rendering the family ineligible for food stamps.

ADDITIONAL FACT FINDINGS REGARDING THE ADOPTION SUBSIDY PROGRAM

18. The adoption subsidies paid by SRS to both petitioners are federally funded at a rate of 61.34 percent through Title IV-E of the federal Social Security Act.

19. The amount of the adoption payment is set based upon the special needs of the child and the family's resources and is reviewed annually. That amount can be renegotiated if the child's needs change and the adoptive parent is required to notify SRS of any change in the child's condition. The adoption subsidy can stop if the parents do not cooperate in reporting the needs of the child. In addition, SRS has a procedure for requesting payment of certain unanticipated extraordinary expenses such as

residential treatment if the child should need it in the future. (Adoption Assistance Agreement/Social Services Policy Manual No. 193, 9/17/99).

20. On February 6, 1991, PATH asked the regional office of the Food and Nutrition Service whether federal adoption subsidies funded under Title IV-E of the Social Security Act are countable or excludable as income for food stamps. FNS responded that, "The subject payments are counted as unearned income, except for any portion which covers medical care."

ORDER

The decision of DCF that adoption subsidies must be counted as income in the Food Stamp program is affirmed. However, the matter is remanded to DCF in order to allow each petitioner to verify, if necessary, to what extent the adoption subsidies were actually used to cover special needs expenses, particularly medical and dependent care. Amounts actually used for these purposes shall be deducted as "reimbursements" under DCF's regulations.

REASONS

The Food Stamp program is fully federally funded but is administered by the states which are given some, but not much, discretion about determining eligibility standards. See generally 7 USC § 2011 et seq. Vermont's Food Stamp regulations follow the language set forth in the federal statutes and regulations very closely. States are directed by the federal statute establishing the Food Stamp program to "include all income from whatever source" excluding only certain enumerated kinds of income when determining eligibility. 7 USC § 2014(d). Among the income that is specifically excluded in that federal statute is the following:

> (18) at the option of the State agency, any types of income that the State agency does not consider when determining eligibility for (A) cash assistance under a program funded under part A of title IV of the Social Security Act (42 USC 601 et seq.), [Reach Up benefits in Vermont] or the amount of such assistance, or (B) medical assistance under section 1396u-1 of Title 42 [Medicaid benefits in Vermont] except that this paragraph does not authorize a State agency to exclude wages or salaries, benefits under title I, II, IV, X, XIV, or XVI of the Social Security Act (42 USC 301 et seq.), regular payments from a government source (such as unemployment benefits and general assistance), worker's compensation, child support payments to a household member by an individual who is legally obligated to make the payments, or such other types of income the consideration of which the Secretary determines by

> regulation to be essential to equitable determination of eligibility and benefit levels.
>
> 7 USC § 2014 (emphasis supplied)

Vermont, in fact, does exclude adoption subsidy benefits from income when determining eligibility in its Reach Up program (WAM § 2255.1(9)) and in its Medicaid program (M336). However, the underlined language above apparently gave DCF's predecessor agency (PATH) pause as to whether adoption subsidies, which are funded through Title IV-E of the Social Security Act, could be excluded from income in the Food Stamp program. As FNS' regulations codified at 7 CFR 237.9 made no mention of adoption subsidies, the Vermont agency wrote to the FNS office for guidance in 1991 and was told that the subsidies had to be included as unearned income "except for any portion that covers medical care."

Based on that information, Vermont never adopted a regulation excluding all adoption subsidy payments in the Food Stamp program. Other states, New York and Washington for two, apparently either unaware of the federal statute or interpreting it differently from FNS, adopted state regulations which allowed for the deduction of adoption subsidies in the Food Stamp program. In April of 2004, at the request of several states, FNS issued a "clarification"

in the federal register regarding the types of income that could be excluded under 7 USC § 2014(d)(18), 69 Fed. Reg. 20743-20744 (2004). FNS concluded that even though states have latitude to exempt income in the Food Stamp program which is also exempted in their Reach Up and Medicaid programs, they were expressly forbidden from excluding all income from adoption subsidy payments because they were funded by Title IV-E of the Social Security Act. Furthermore, FNS proposed the adoption of a new regulation to be codified as 7 CFR § 273.9(c)(19) specifically stating that "the State agency shall not exclude . . . benefits under Title I, II, IV, XIV of XVI of the Social Security Act . . . including foster care and adoption payments. . .". 69 Fed. Reg. at 20760.

It cannot be said that the interpretation of FNS is incorrect or that its position represents a change in the law. The language in the federal statute is quite plain that a state cannot opt to exclude benefits paid through Title IV of the Social Security Act. Although this statute appears to stand alone among federally funded benefit programs in its inclusion of this income, that fact in and of itself does not

make the statute unconstitutional.[2] Congress is free to decide the eligibility criteria for its programs and absent a showing of some sort of constitutional violation, the statute will stand. No such showing of unconstitutionality was shown by the petitioners in this matter. While the provisions of the statute may or may not be good policy, that is not a basis for a state administrative review Board to overturn a federal statute. DCF was thus correct under federal law not to grant a blanket exclusion to the adoption subsidies received by the petitioners in this case.

That finding does not end the inquiry, however, because even income which is not generally excluded by the statute and regulations, can still be deducted or excluded under other provisions of the statute. The petitioners argue that they should receive a deduction for excess medical expenses under Vermont's own regulations:

> Income Deductions
>
> Deductions shall be allowed only for the following household expenses:
>
> . . .
>
> 3. Excess Medical Deduction

[2] The anomalous nature of this rule no doubt explains why Departmental workers accustomed to excluding this income in the Reach Up and Medicaid programs would make the mistake of excluding it also in the Food Stamp program as occurred in the case of Petitioners L.

> That portion of medical expenses in excess of $35 per month, excluding special diets, incurred by any household member who is elderly or disabled as defined in 272.1. . .
>
> F.S.M. 273.9(d)[3]

Definitions

Elderly or disabled means a member of a household who:

1. is 60 years of age or older;

2. receives Supplemental Security Income benefits under Title XVI of the Social Security Act [SSI] or disability or blindness under Titles I, II, X, XIV, or XVI of the Social Security Act;

3. receives Federally or State-administered supplemental benefits under section 1616(a) of the Social security Act provided that the eligibility to receive the benefits is based upon the disability or blindness criteria used under Title XVI of the Social Security Act;

4. receives Federally or State-administered supplemental benefits under section 212(a) of Public Law 93-66;

5. receives disability retirement benefits from a government agency because of a disability considered permanent under section 221(i) of the Social Security Act;

6. is a veteran with a service-connected or non-service connected disability rated by the Veteran's Administration (VA) as total or paid as total by the VA under Title 38 of the United States Code;

[3] This regulation exactly tracks the language in the federal regulation on deductions at 7 CFR § 273.9(d). The federal statute authorizing the deduction for excess medical expenses speaks only of the "elderly and disabled" without definition. 7 USC § 2014(e)(5).

7. is a veteran considered by the VA to be in need of regular aid and attendance or permanently housebound under Title 38 of the United States Code;

8. is a surviving spouse of a veteran. . .

9. is a surviving spouse or surviving child of a veteran. . .

10. receives an annuity payment under section 2(a)(1)(iv) of the Railroad Retirement Act. . .

F.S.M. 271.2[4]

While the children involved in this appeal might be "disabled" as a lay person understands that term, they do not meet any of the criteria set forth in the above regulation defining disability for the Food Stamp program. Children who receive IV-E benefits are not part of the above definition. Of course disabled children may be eligible for SSI benefits but until they apply and are found eligible, they cannot meet the criteria at paragraph (2) above. The Board cannot create a new definition of "disabled" to accommodate these children for purposes of qualifying for excess medical deductions.

However, there is another exclusion, as opposed to a deduction, set forth in the federal statute for any income paid to a family which is actually a reimbursement:

[4] This language is also identical to that found in the federal regulations at 7 CFR § 271.2.

> (5) Reimbursements which do not exceed expenses actually incurred and which do not represent a gain or benefit to the household. . .
>
> 7 USC § 2014(d)

That particular provision of the statute has been exhaustively codified in the FNS' federal regulations which provide, in pertinent part:

> b) Definition of income.
>
> Household income shall mean all income from whatever source excluding only items specified in paragraph (c) of this section.
>
> . . .
>
> (c) Income exclusions.
>
> Only the following items shall be excluded from household income and no other income shall be excluded:
>
> . . .
>
> (5) Reimbursements for past or future expenses, to the extent they do not exceed actual expenses, and do not represent a gain or benefit to the household. Reimbursements for normal household living expenses such as rent or mortgage, personal clothing, or food eaten at home are a gain or benefit and, therefore, are not excluded. To be excluded, these payments must be provided specifically for an identified expense, other than normal living expenses, and used for the purpose intended. When a reimbursement, including a flat allowance, covers multiple expenses, each expense does not have to be separately identified as long as none of the reimbursement covers normal living expenses. The amount by which a reimbursement exceeds the actual incurred expense shall be counted as income. However, reimbursements

> shall not be considered to exceed actual expenses, unless the provider or the household indicates the amount is excessive.
>
> (i) Examples of excludable reimbursements which are not considered to be a gain or benefit to the household are:
>
> . . .
>
> (C) Medical or dependent care reimbursements.
>
> 7 CFR § 273.9

The regulation adopted by Vermont pursuant to the above federal regulation uses exactly the same language. F.S.M. § 273.9(c)(5). The plain intent of this regulation is to exclude any part of a payment made to a Food Stamp household that is intended to reimburse expenses other than regular household expenses. Reimbursements made for medical and dependent care are specifically excludible under this regulation.

The petitioners receive monthly payments from SRS the amount of which is set based upon the particular special needs of the children they have adopted and their own ability to cover those expenses. Each of the children in these two cases have serious physical and emotional problems which have to be addressed and which may require therapeutic treatments, such as special summer programs, which are not covered by Medicaid. These payments are clearly reimbursements for

special expenses these families may incur in caring for these children. It is true that the families are not specifically required to spend the money in a particular way; neither are they prohibited from spending the money on household expenses. However, to the extent that they do spend the money for the medical and care needs for the adopted children, the payments are true excludible reimbursements. The above regulation contemplates that flat allowances paid out every month can be separated out as to amounts that go for medical or care needs and those that are put into common household expenses. The former are deductible as reimbursements because they do not represent a gain to the household; the latter are a gain and are not deductible. The use of this regulation to exclude moneys paid out for and actually used for special medical and care needs is consistent with the original FNS opinion (see paragraph 20, Proposed Findings of Fact) that portions of the IV-E payments used to cover medical care should not be included as income and the desire of Congress expressed in the statute to make "equitable determinations of eligibility and benefit levels." 7 USC § 2014(d)(18).

The regulation above makes it clear that once a payment is considered to be in the form of a "reimbursement" a

presumption exists that it covers actual expenses, in this case special needs of the children. However, if the provider of the funds or the household indicates that the payments are in excess of the special needs in any month, the excess may be counted as income, particularly if it was available for ordinary household expenses. Congress has apparently decided in its general inclusion of these benefits as income that they can represent a gain or benefit to a household. DCF has the obligation under its regulations to verify the amounts of all nonexempt income and may request such verification from the petitioners. F.S.M. 273.2f(1)(i). The matter is remanded to allow such verification to occur, if necessary.

Of course, both sets of petitioners have a further remedy in the form of a subsequent appeal if they do not feel the amount of their deductible reimbursements are properly figured. In addition, any overpayment that may still exist for Petitioners L. after the reimbursements are deducted may be subject to further compromise under the claims section of the Food Stamp regulations. F.S.M. § 273.18(e)(7).

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